

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7513

Petition of Department of Public Service to)
impose penalties and other remedial action upon)
Vermont Gas Systems, Inc. ("VGS"), re:)
probable violations of Vermont law, pertaining)
to gas safety, involving 31 separate locations)
installed, owned, operated and/or maintained by)
VGS)

Order entered: 2/8/2010

PROCEDURAL ORDER

In this Order, I dispose of two issues in this case: (1) a request from the Vermont Department of Public Service (the "Department") for voluntary dismissal of certain claims against Vermont Gas Systems, Inc. ("VGS" or the "Company"); (2) a request from VGS to suspend Public Service Board Rule 6.100 and to initiate a rulemaking proceeding to clarify that rule. I also direct the parties to submit proposals for a litigation schedule for this docket.

On October 23, 2009, I issued an Order granting in part and denying in part a motion for summary judgment and a motion to dismiss by VGS in response to a Notice of Probable Violation ("NOPV") issued to the Company by the Department on February 27, 2009.

On October 29, 2009, the Department filed a letter raising a newly-identified concern about a possible jurisdictional defect in this proceeding.

On November 16, 2009, I ordered the Department to "clarify whether or not it wishes to withdraw the NOPV for lack of Board subject-matter jurisdiction to adjudicate the claims pertaining to customer-owned property," or, in the alternative, to "file a brief specifically

identifying and explaining the legal grounds for invoking the Board's subject-matter jurisdiction in this proceeding."¹

On December 11, 2009, the Department filed a Notice of Voluntary Dismissal. In that filing, the Department stated that "Counts 1, 2, 3, 4, 6, 7, 8, 12, 13, 14, 15, 26, 27 and 30 are dismissed in their entirety, without prejudice," and that "Counts 5, 16, 17, 18, 19, 20, 24 and 29 are dismissed only to the extent that they allege violations pertaining to property downstream of the customer meter."² As grounds for filing the DPS Notice, the Department cited its legal conclusion that the Board lacks subject-matter jurisdiction pursuant to 30 V.S.A. § 203 to regulate the property at issue and to adjudicate the alleged violations as described in the above-referenced counts in the Department's NOPV.³

On December 15, 2009, VGS filed a response to the DPS Notice supporting the Department's dismissal request, but seeking confirmation that "*all allegations* related to counts 1, 2, 3, 4, 6, 7, 8, 12, 13, 14, 26, 27 and 30 would be dismissed."⁴

On January 20, 2010, the Department filed a letter reiterating that its dismissal request pertains "only to allegations that involved customer-owned property."⁵ The Department offered no further response to VGS's request for clarification as to whether all of the allegations supporting Counts 1, 2, 3, 4, 6, 7, 8, 12, 13, 14, 15, 26, 27 and 30 may be deemed to be allegations "that involved customer-owned property."

The Department's request for voluntary dismissal

The voluntary dismissal of an action is governed by Rule 41 of the Vermont Rules of Civil Procedure, which is applicable to Board proceedings pursuant to Board Rule 2.105. In filing the DPS Notice, the Department did not specify the procedural rule pursuant to which it

1. Docket 7513, Order of 11/16/09 at 2.

2. Notice of Voluntary Dismissal dated December 11, 2009, at 1 (The "DPS Notice").

3. *Id.* at 1-2.

4. Letter from Kimberly Hayden, Esq., to Susan Hudson, Clerk of the Board, dated December 16, 2009, at 1(emphasis added).

5. Letter from Jeanne Elias, Esq., to Susan Hudson, Clerk of the Board, dated January 20, 2010.

had submitted this filing.⁶ Accordingly, I will treat the DPS Notice as a motion seeking leave to voluntarily dismiss portions of its NOPV pursuant to V.R.C.P. 41(a)(2). That rule provides for voluntary dismissal "upon order of the court, and upon such terms and conditions as the court deems proper."

The DPS Notice unambiguously states that the Department wishes to dismiss Counts 1, 2, 3, 4, 6, 7, 8, 12, 13, 14, 15, 26, 27 and 30 "in their entirety, without prejudice" because the allegations for those counts pertain "solely" to customer-owned property.⁷ Furthermore, later in the DPS Notice, the Department characterizes the effect of granting its request for relief as "the dismissal of all allegations that pertain to 'customer-owned property'" ⁸ Therefore, I conclude it is proper and reasonable to deem as withdrawn all of the allegations in the NOPV pertaining to Counts 1, 2, 3, 4, 6, 7, 8, 12, 13, 14, 15, 26 and 30.⁹ Accordingly, with this point of clarification in mind, I hereby grant the Department's request to voluntarily dismiss Counts 1, 2, 3, 4, 6, 7, 8, 12, 13, 14, 15, 26 and 30 in the entirety, without prejudice.

Turning to the Department's request to partially dismiss Counts 5, 16, 17, 18, 19, 20, 24 and 29, I note that VGS has neither opposed this request nor otherwise suggested a need for clarification of the scope of dismissal. Accordingly, I hereby grant the Department's request to voluntarily dismiss Counts 5, 16, 17, 18, 19, 20, 24 and 29, to the extent that these counts allege violations pertaining to customer-owned property.

In granting the Department's voluntary dismissal requests, it is not necessary for me to examine the merits of the Department's grounds for seeking this dismissal.¹⁰ I therefore expressly do not rule upon the question of whether the Board possesses the requisite subject-

6. The DPS Notice was styled as a "Notice of Voluntary Dismissal." Such notices are typically filed pursuant to V.R.C.P. 41(a)(1), which provides for voluntary dismissal by the plaintiff without order of the court. However, the threshold requirements for proceeding under V.R.C.P. 41(a)(1) have not been met in this case, as VGS has already filed an answer and a motion for summary judgment, and the Department and VGS have not executed a stipulation providing for voluntary dismissal.

7. DPS Notice at 1.

8. *Id.* at 2.

9. I have not included Count 27 among the counts to be dismissed in the entirety because that count has already been dismissed from this docket. See Docket 7513, Summary Judgment Order dated 10/23/09 at 18.

10. The Department is seeking voluntary dismissal because the counts at issue "do not appear to fall within the jurisdiction granted to the Public Service Board and the Department of Public Service in Title 30 V.S.A. § 203." DPS Notice at 1.

matter jurisdiction to regulate the property and activities at issue in the counts that have been dismissed in this Order.

VGS's request to suspend Rule 6.100

VGS first requested suspension of Rule 6.100 and the initiation of a rulemaking proceeding as part of the response it filed to the NOPV on March 30, 2009.¹¹ At that time, the Company asserted that the Department's construction and application of Rule 6.100 in this enforcement proceeding amounted to an attempt "to expand the federal regulations to above-ground, customer-owned service pipe," and that this "raises a host of difficult issues that need to be considered and carefully evaluated."¹²

In the Summary Judgment Order issued on October 23, 2009, I directed the Department to respond to VGS' request to suspend Rule 6.100 in favor of a rulemaking proceeding. The Department has since filed a response stating that it does not believe VGS' request for relief is warranted because the Department has moved for "the dismissal of all allegations that pertain to 'customer-owned property'"¹³

In view of my decision to grant the Department's request for voluntary dismissal, I conclude that VGS's request for suspension of Rule 6.100 is now moot, as there are neither any allegations nor any counts remaining in this docket that pertain to customer-owned property. Therefore, VGS's request to suspend Rule 6.100 is denied as moot.

Litigation schedule proposals

I hereby direct the parties to file proposals for a litigation schedule that will allow this matter to go forward for a determination on the merits.¹⁴ The parties' proposed schedules shall be filed by close of business on February 22, 2010. I urge the parties to use their best effort to reach agreement in submitting a joint proposal.

11. *Response of Vermont Gas Systems, Inc. and Request for Relief* dated March 30, 2009, at 10-11.

12. *Id.* at 11.

13. DPS Notice at 2.

14. The Department has indicated that it intends to file an amended NOPV. If this continues to be the case, then its proposed litigation schedule shall include a specific deadline for filing this amendment. As I have previously observed in this docket, VGS has a heightened need for a plain statement that shows the Department is entitled to the relief it is seeking in this enforcement proceeding. *See* Docket 7513, Summary Judgment Order dated 10/23/09 at 21. Accordingly, any amended NOPV should be drafted with sufficient particularity to meet the pleading requirements of V.R.C.P. 8(a). *See id.* at 20 n. 60.

SO ORDERED.

Dated at Montpelier, Vermont, this 8th day of February, 2010.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: February 8, 2010

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)